

## The Legal Regime Affecting Online Consultations in Europe

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*Abstract: In the last decade, at both supranational and national levels, European governments have been actively promoting online consultations. These efforts have already resulted in a substantial body of law that, combined with existing legislation, affects both governments and citizens when engaging in online consultation. This article seeks to broaden understanding of how legal regimes effectively shape these consultations. Designed to navigate readers, especially those outside the European Union, through what frequently seems to be an impenetrable network of institutions and sources of law, it maps pertinent legal terrain surrounding the EU online consultations. The article then continues by exploring key legal building blocks of successful online consultations and argues that participation, communication, and information rights, when distilled, remain at the core of online consultation processes. It acknowledges that modern technologies challenge these rights; yet instead of drafting new laws, it proposes that special attention should be put particularly to applying these rights to the online world. Based on the*

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*existing laws and current consultation practices, it identifies potential legal challenges and suggests alternative solutions.*

The European Union and its member states are, without doubt, the global leaders in the sponsorship of “online consultations”—that is, government-initiated or government-supported opportunities for everyday citizens to participate in policy dialogue with public officials via the Internet. The design of such consultations is shaped by a variety of factors, from the technological to the cultural. One set of elements undoubtedly critical to the design, robustness, and utility of such consultations is legal—the set of rules, standards, and normative institutional practices that establish both the rights of citizen-participants and the role of governments in engaging with citizens in policy discourse.

Understanding the legal regime that applies to online consultations in the European Union is a matter of unusual complexity because the regime involves the handiwork of a great many institutions, which interact in subtle ways.<sup>1</sup> When illustrating legal requirements at the national, rather than EU level, this article most frequently uses examples from Slovenia, the author’s home country, but these often have their counterparts, albeit with local variation, in the other member states, as well. This article is intended to map the legal terrain surrounding European Union online consultations and thus to lead readers, especially outside the European Union, through what must frequently seem to be an impenetrable network of institutions and sources of law. A map of this kind can be used to support both policy design with regard to the legal foundations of online consultation and further research seeking to clarify the role of different elements of the legal regime on various measures of consultation participation, robustness, and impact.

The legal regime affecting online consultations involves both “hard” and “soft” elements. Certain instruments impose binding obligations on member states, as discussed below. EU policy and “soft-law” documents, though not legally binding, need also to be considered because European institutions, when conducting online

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<sup>1</sup> This discussion pertains only to online consultations where public authorities act as sponsors. In the European legal context, the latter may refer to any European institution or agency, state authority, local government, or any other bearer of public authority. These public authorities are, when developing rules for online consultations, bounded by two factors: first, the pertinent laws and regulations, and second, the challenges related to the novelty of interactive online forums.

consultations, are expected to be committed to such guidelines, as well.

The member states themselves are required to comply with EU legislation, which is imposed predominantly through two instruments: regulations and directives. The legal implications of these instruments vary considerably. While the regulations take effect in all member states without the need for national implementation measures, the directives must be implemented by all member states within a given timeframe using their own legislative systems. With the latter, providing they meet the minimum standards set by the Directives, the member states are empowered to adopt different legislative solutions. Therefore, when considering the legal regime surrounding online consultation, we must also take a look at different national regimes addressing these issues.

In addition to the EU and the member states' legislation, EU case law also plays a part. The European Court of Justice (ECJ) has established its position as an important actor in interpreting the EU body of law.<sup>2</sup> Delving into the Court's case law, particularly the ECJ's preliminary rulings,<sup>3</sup> could play a role in setting the legal framework for online consultation. Designed to assure that Community law is interpreted and applied in the same way in all EU member states, preliminary rulings take into account both the constitutional traditions common to the member states and the doctrine on protection of human rights as developed by international treaties that the member states have signed and ratified. From this perspective, the ECJ is an integral link in setting the framework of the EU legal regime.

In addition, the legal standards established by international organizations, though not directly applicable, also warrant mention. Because all EU member states are also members of, for example, the Council of Europe and the United Nations, the international treaties

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<sup>2</sup> Through its case law, the ECJ makes sure that national courts apply Community law in full and in a manner appropriately aligned with the doctrine of primacy of Community law over national law, while also nullifying any conflicting national provisions of law. It significantly contributes to the development of a legal environment that protects rights conferred on citizens by Community law, and has, through its case law, enabled EU citizens to refer directly to Community provisions at their national courts.

<sup>3</sup> A "preliminary ruling" is given when national courts ask the ECJ for advice on an interpretation or on the validity of the EU law. By making sure that community law is interpreted and applied in the same way in all EU countries—that is, that national courts do not give different rulings on the same issue—preliminary rulings unify legal practices across the EU member states.

that bind all these states must also be taken into account. This is especially important for those treaties intended to help assure the highest standards of human rights and freedoms. Unlike the United States, it is not uncommon for EU member states to treat ratified treaties<sup>4</sup> as part of their domestic legal order automatically, without further implementing legislation.<sup>5</sup> As a result, this international corpus of law has the same effect as the laws adopted by a national parliament.

From this perspective, the European Court of Human Rights (ECHR) also warrants mention. While established under an international organization, the Council of Europe, the ECHR plays an influential part in consolidating the protection of the rights conferred on individuals by the Convention for the Protection of Human Rights and Fundamental Freedoms. In practice, this means that citizens are entitled to demand protection of these internationally recognized rights directly at their national courts. This makes it likely that the ECHR's case law will contribute to a more diligent application of Convention provisions by the EU member states. Nevertheless, because the Council of Europe cannot directly impact the EU laws on

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<sup>4</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); International Convention on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967); Convention for the Protection of Human Rights and Fundamental Freedoms (also referred to as European Convention on Human Rights, ECHR), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221, as last amended by Protocol No. 14, May 13, 2004, CETS No. 194, entered into force June 1, 2010.

<sup>5</sup> For example, the Slovenian Constitution (Ustava Republike Slovenije, Ur. l. RS št. 33/91-I, 42/97, 66/2000, 24/03, 69/04 and 68/06 [hereinafter Slovenian Constitution]) states that "ratified and published [international] treaties shall be applied directly." Slovenian Constitution, art. 8. No additional legal act is required in order for citizens to exercise these rights or request judicial protection. Moreover, regarding the established rule of law and the hierarchy of legal acts, ratified international treaties are superior to domestic laws. Hence, the Constitution provides that domestic "laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia." *Id.*, art. 8. Similar methods of treating ratified international treaties as norms in domestic law can be observed in the Netherlands, Czech Republic, Romania, and Spain; whereas in Germany and Finland, in order to be effective, international norms must be incorporated first. On different methods of fulfilling the obligations under the ratified international treaties, see, e.g., Soren Stenderup Jensen and Angel Rodriguez-Vergara Díaz, *European Convention on Human Rights in Domestic Law: A Comparative Study of the Convention's Position in Denmark and Spain*, 63 NORDIC J. INT'L L. 139, 142-72 (1994) (discussing different methods of fulfilling treaty obligations).

online consultation, and thus the ECJ cannot accede and agree to be bound by the Council of Europe's treaties,<sup>6</sup> the ECHR case law as such will not be further discussed here.

Finally, some regional initiatives also warrant mention. For example, the recently adopted Tuscany Law on Citizens' Participation represents a rather ambitious endeavor to set a legal framework for consultation.<sup>7</sup> It gives special focus to the establishment of new participatory bodies (for example, the Regional Public Debate Institute and the Regional Authority for Guaranteeing and Promoting Participation)<sup>8</sup> with a mandate to facilitate deliberative democracy on the regional level. It is promising that the law, though somewhat vaguely, addresses the issues of communicative pathways and rules of communicative engagement. Despite its permissive language, this law embodies a rather bold approach toward setting a regulatory framework for online participation. In the coming years, it will undoubtedly be beneficial to observe its implementation from both an institutional and legislative perspective. Its practical implications could provide invaluable insight regarding various legal issues of online consultation.

Another regional initiative of interest, though in this case not legally binding, is the Eurocities eRights Charter.<sup>9</sup> This Charter, signed by almost forty European cities, represents a clear signal that local governments are ready to commit to online consultation. With an objective to "ensure transparent public administration," Chapter IV of this Charter ensures that "every citizen of the EU [has] the right to

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<sup>6</sup> See Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759.

<sup>7</sup> Tuscany Law on Citizens Participation, Legge Regionale 27 dicembre 2007, n. 69, in Boll. Uff. Reg. Toscana 3 gennaio 2008, n. 1. Its drafting was a grand project of deliberation itself. More than 2700 participants were actively involved in the drafting process. See *Best Practice Cases*, 5TH QUALITY CONFERENCE FOR PUBLIC ADMINISTRATION IN THE EU, [http://www.vng.nl/Praktijkvoorbeelden/BR/BPAR/2008/Italie\\_ParticipationTuscanyRegion\\_2008.pdf](http://www.vng.nl/Praktijkvoorbeelden/BR/BPAR/2008/Italie_ParticipationTuscanyRegion_2008.pdf) (last visited Mar. 20, 2011) for more on the process.

<sup>8</sup> This Authority was designed to play the role of an independent and neutral organ in public participation processes. The law is somewhat scarce on the explication of means that would assure such independence. In addition, the legal framework for the Authority's managerial power leaves something to be desired, as does the vagueness of the proposed "communication rights."

<sup>9</sup> European Charter of Rights of Citizens in the Knowledge Society, 2005, available at [http://www.eurocities.eu/uploads/load.php?file=know\\_charter\\_eRights\\_final-SMu.pdf](http://www.eurocities.eu/uploads/load.php?file=know_charter_eRights_final-SMu.pdf).

participate through ICT platforms in the decision-making processes of his or her local government.”<sup>10</sup> On a similar note, the Dutch e-Citizen Charter<sup>11</sup> defines quality standards for digital interactions between citizens and the government that have been accepted as the standards for service delivery on all levels of Dutch government.

And perhaps most importantly, all these initiatives not only address the need to facilitate online consultation, but also explicitly address the need to define and confirm citizens’ rights in online participation.

## I. LEGAL FOUNDATIONS FOR ONLINE CONSULTATION

### A. THE RIGHT TO PARTICIPATE

To provide a complete overview, we must first explore the legal source of “the right to participate” in online consultation. From the outset, one notices that “the right to take part in the government of one’s country” is embedded in the Universal Declaration of Human Rights.<sup>12</sup> While the EU Charter of Fundamental Rights<sup>13</sup> does not explicitly address the “citizens’ right to participate,” this should still be perceived as one of the EU’s major political objectives. For example, the EU i2010 eGovernment Action Plan specifically addresses the strengthening of citizen participation as one of its primary goals.<sup>14</sup> And, in a more legal context, the Treaty on European Union, as

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<sup>10</sup> *Charter of Rights of Citizens in the Knowledge Society*, EUROCITIES, (Jun. 23, 2005), available at [http://www.eurocities.eu/uploads/load.php?file=know\\_charter\\_eRights\\_final-SMu.pdf](http://www.eurocities.eu/uploads/load.php?file=know_charter_eRights_final-SMu.pdf).

<sup>11</sup> *Citizenlink e-Citizen Charter*, BURGERLINK, <http://www.burgerlink.nl/Documenten/burgerlink-1.0/live/binaries/burgerlink/pdf/citizen-charter/e-citizen-charter-english.pdf> (last visited Mar. 20, 2011).

<sup>12</sup> Universal Declaration of Human Rights, *supra* note 4, art. 21, para. 1.

<sup>13</sup> Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

<sup>14</sup> *Commission Communication on i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All*, at 4, COM (2006) 173 final (Apr. 25, 2006). See also *Commission Communication on the Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate*, COM (2005) 494 final (Oct. 13, 2005).

amended by the Treaty of Lisbon,<sup>15</sup> states that every citizen is granted “the right to participate in the democratic life of the Union.”<sup>16</sup> The principle of participatory democracy explicitly requires EU institutions to “give citizens . . . the opportunity to make known and publicly exchange their views in all areas of Union action.”<sup>17</sup> Furthermore, the most tangible participation is embodied in the citizens’ right of initiative: one million European citizens have the right to invite “the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.”<sup>18</sup>

What is not clear, however, is whether such explicit guarantees are either necessary or sufficient to reshape the existing practice of online consultation. On the one hand, through its General Principles and Minimum Standards for Consultation,<sup>19</sup> the European Commission has already reaffirmed its dedication to broad public consultations as an integral part of its decision making. These consultative standards were introduced precisely with this goal: to reinforce the Commission’s duties to “consult widely before proposing legislation.”<sup>20</sup>

On the other hand, the judicial protection of the participation rights thus conferred, given the legal nature of the Minimum Standards, would appear problematic. Minimum standards have been adopted as a policy rather than through a binding legal document,

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<sup>15</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>16</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, art. 10, para. 3, May 9, 2008, 2008 O.J. (C115) 1.

<sup>17</sup> *Id.*, art. 11, para. 1. Nevertheless, the question is whether participation, as envisaged by the Lisbon Treaty, will in practice be exercised through citizens as participative agents, or whether priority will in fact be given to representative associations. Some stipulations suggest the latter would have a priority. For example, EU institutions are required to “maintain an open, transparent and regular dialogue with representative *associations and civil society*.” *Id.*, art. 11, para. 2 (emphasis added).

<sup>18</sup> *Id.*, art. 11, para. 4.

<sup>19</sup> *General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM (2002) 704 final (Dec. 11, 2002) [hereinafter *General Principles and Minimum Standards for Consultation*].

<sup>20</sup> Protocol (No. 30) on the Application of the Principles of Subsidiarity and Proportionality, 1997 O.J. (C340) 105.

thus providing citizens with no real measure of legal security. Citizens are not entitled to demand judicial protection based on the Minimum Standards, nor may they challenge decision making based in part on online consultation on grounds of alleged participatory deficiency.<sup>21</sup>

In comparison to the “soft legal nature” of the General Principles and Minimum Standards for Consultation, patterns of substantially stronger legal protection for participation rights can be found at the national levels of the EU member states. For example, with regard to the effective laws supporting citizens’ participation rights, the Hungarian approach is certainly of interest. With its Act on the Freedom of Information by Electronic Means, Hungary has adopted provisions requiring all organizations preparing legislation to ensure “that anybody can comment on and make proposals concerning the drafts of legal regulations.”<sup>22</sup> Yet more ambitiously, authorities are legally obligated, first, to consider the submitted comments, and second, to produce and publish “a summary of the comments along with an explanation for the rejection of the comments not accepted.”<sup>23</sup> One can imagine that these provisions offer Hungarian citizens effective grounds for action in case the government would breach its own laws.

Though being at the forefront, the Hungarian Act is not the only one setting a new yardstick for participation rights. Similar stipulations can be found in international law, particularly in the area of environmental protection. For example, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Århus Convention),<sup>24</sup> approved also by the EU,<sup>25</sup> requires governments to ensure that they

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<sup>21</sup> The question of whether the Lisbon Treaty will provide citizens with stronger protection of their participatory rights pertains. While the Treaty introduces a welcome acknowledgement of participation rights, its general wording does not suggest direct judicial applicability.

<sup>22</sup> 2005. évi XC. törvény az elektronikus információszabadságról (Act XC of 2005 on the Freedom of Information by Electronic Means) art. 10, para. 1. English translation *available at* [http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/2005\\_XC](http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/2005_XC).

<sup>23</sup> *Id.*, art. 10, para. 4. The only exception pertains to cases where comments self-evidently lack any rational basis.

<sup>24</sup> United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Jun. 25, 1998, 2161 U.N.T.S. 447; 38 I.L.M. 517 (1999).

<sup>25</sup> See Council Decision (EC) No. 370/2005, Feb. 17, 2005, 2005 O.J. (L 124) 1.



take public participation into account when making environmental decisions.<sup>26</sup> This Convention has provided, to all persons who feel their participation rights might have been impaired, the right, in the appropriate circumstances, to a review procedure under national legislation. As a result, national courts have already addressed these issues. For example, the Slovenian Constitutional Court recently annulled a decree on free-range species simply because the public participation procedure had not been appropriately addressed. The Court ruled that “the legislature should, when delegating power to the executive for adopting administrative regulation . . . also make provisions on procedural rules for efficient public participation in the process of developing these regulations.”<sup>27</sup>

## B. THE RIGHT TO PETITION

In addition to the right to participate, the right to petition also warrants discussion. To begin with, the Charter of Fundamental Rights of the European Union guarantees every citizen the right to petition the European Parliament on “any matter which comes within the European Community’s fields of activity” and “affects him or her directly.”<sup>28</sup> Similarly, yet in a more general manner, the Slovenian Constitution grants citizens “the right to file petitions and to pursue other initiatives of general significance.”<sup>29</sup> In practice, these “initiatives of general significance” may range anywhere from an individual grievance to an appeal for public bodies to take a stance on a matter of public interest, and may be addressed to any public authority, including the European Parliament.

Such extended provisions were also included by the Treaty of Lisbon: one million citizens may “take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.”<sup>30</sup> On a similar note, the EU Constitution also proposed

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<sup>26</sup> See *id.*, art. 6, para. 8.

<sup>27</sup> Odl. US: U-I-386/06, Ur. l. RS št. 32/2008.

<sup>28</sup> Charter of Fundamental Rights of the European Union, art. 44, 2000 O.J. (C 364) 1. See also Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *supra* note 16, arts. 24, 227.

<sup>29</sup> See Slovenian Constitution, *supra* note 5, art. 45.

<sup>30</sup> See Treaty of Lisbon, *supra* note 15, art. 11, para. 4.

extension of the right to petition to all fields of activity of the EU, and the Treaty of Lisbon later incorporated this. According to the new consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, European citizens now have “the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union.”<sup>31</sup>

## II. COMMUNICATION RIGHTS

### A. FREEDOM OF EXPRESSION

When it comes to online consultations, communication rights and information freedoms are also of vital importance. When addressing communication rights, the principle of freedom of expression is paramount. On an international level, this “common standard of achievement for all peoples and all nations” was initially embedded in the international legal system by the UN Universal Declaration of Human Rights more than half a century ago. Because “equal and inalienable rights” represent the “foundation of freedom, justice and peace in the world,” the UN further reinforced these principles by the International Covenant on Civil and Political Rights.<sup>32</sup>

In the European context, the Council of Europe also addressed freedom of expression. In 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms established that “everyone has the right to freedom of expression.”<sup>33</sup> Fifty years later, the EU itself followed this wording when adopting its Charter of Fundamental Rights of the European Union.<sup>34</sup> In addition to these international obligations common to all EU member states, European constitutional traditions also play a part. In Slovenia, the Constitution guarantees the freedom of expression of thought and of speech,<sup>35</sup> and similar provisions can also be found in other European national constitutions.

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<sup>31</sup> *Id.*, art. 20, para. 2(d).

<sup>32</sup> See International Covenant on Civil and Political Rights, *supra* note 4.

<sup>33</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4.

<sup>34</sup> Charter of Fundamental Rights of the European Union, *supra* note 13, art. 10.

<sup>35</sup> Slovenian Constitution *supra* note 5, art. 39, para. 1.

Nevertheless, freedom of expression is not an absolute category in European jurisprudence; it is a principle that implies corollary duties and responsibilities. It is precisely these duties and responsibilities that seem to be most problematic when the principle of freedom of expression is applied to public consultations. The obvious questions posed are whether there are legitimate reasons for restricting freedom of expression in public consultations generally, and whether these reasons, or their weight, differ when applied to the online world.

Existing laws already stipulate some legitimate reasons for imposing “formalities, conditions, restrictions or penalties” on the exercise of the freedom of expression, provided such limitations are “prescribed by law” and “necessary in a democratic society.”<sup>36</sup> For example, the dissemination of classified information could legitimately be restricted in the name of national security or territorial integrity.<sup>37</sup> Freedom of expression could further be restricted in the interest of public safety, prevention of disorder or crime, or protection of health. Dissemination of trade secrets or protected intellectual property could also result in claims for damages or a criminal prosecution. Violations of the rights of others, such as the right to reputation or the right to privacy,<sup>38</sup> may also be subject to restrictions.

When exercised in the online world, it is generally believed that the freedom of expression should remain essentially the same, including its limitations and restrictions. Indeed, there is no legal reason why the freedom of expression should not be granted the same guarantees and be subjected to the same restrictions whether exercised online or offline. For example, participants in online consultations might be liable for copyright infringement or trade secret misappropriation essentially in the same manner as in other forms of public consultation.

## B. MORALITY AND CIVILITY

A trickier issue could be restriction of the freedom of expression on grounds of morality or civility. For example, could it be made unlawful to post a comment denying the Holocaust in online consultation? How should a sponsor react to such a post, if lawful?

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<sup>36</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 14, *supra* note 4, art. 10, para. 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, art. 8; see also the Universal Declaration of Human Rights, *supra* note 4, art. 12.

Could the sponsor legitimately remove it, or would the sponsor have to refrain from removing it on free speech grounds?

While racist or xenophobic comments are widely regarded as socially harmful, it would not be an easy task for a government sponsor to lawfully prohibit them all. Indeed, any limitation of speech, even though comprehensively justified on grounds of morality, inevitably collides with the freedom of expression, and different legal regimes tend to attach different priorities to these principles. For example, when deciding a case concerning the online sale of Nazi memorabilia, the French court ruled that such an act violates the French Criminal Code.<sup>39</sup> When the same case was presented to an American court, it was ruled that “the French orders are not enforceable in the United States because such enforcement would violate the First Amendment.”<sup>40</sup>

In the EU, these issues are further complicated by the fact that even the member states themselves have not established a unified principle that would suggest the legitimate balance between morality and civility on the one hand, and the freedom of expression on the other. While the dissemination of racist or xenophobic material is prohibited by international law<sup>41</sup> and, at least in some member states, also by constitutional law,<sup>42</sup> such restrictions on the freedom of expression are by no means universally accepted. For example, the recently adopted EU Framework Decision on Combating Racism and Xenophobia (EU Decision) stopped short of specifically outlawing Holocaust denial because the EU member states could not reach a

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<sup>39</sup> Tribunal de Grande Instance [TGI Paris] [High Court in Paris], May 22, 2000, *Ligue internationale contre le racisme et l'antisémitisme (Licra) et Union des étudiants juifs de France (UEJF) c. Yahoo! Inc. et Societe Yahoo! France*. Ordonnance de référé, *available at* <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>.

<sup>40</sup> *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1201 (9th Cir. 2006).

<sup>41</sup> *See, e.g.*, Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, Jan. 28, 2003, E.T.S. No. 189.

<sup>42</sup> For example, the Slovenian Constitution prohibits “any incitement to national, racial, religious or other discrimination, and the inflaming of national, racial, religious or other hatred and intolerance.” Slovenian Constitution, *supra* note 5, art. 63. Similar provisions can also be found in France and Romania.

consensus on justified limits on freedom of expression.<sup>43</sup> Contrary to Germany, France, and others that have already criminalized such conduct, countries like Britain, Ireland, Denmark, and Sweden adamantly resisted unified legislation as a violation of civil liberties.<sup>44</sup> When confronted with the need to condemn racist statements, they favored freedom of expression, which effectively stopped the EU from criminalizing these acts altogether.

Nevertheless, the EU Decision did set the framework for criminalizing certain acts of racism and xenophobia. By the end of November 2010, the EU member states were required to adopt national legislation that will introduce criminal penalties for any intentional public incitement “to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin.”<sup>45</sup> All acts “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity, and war crimes” will be punishable by imprisonment.<sup>46</sup> Obviously, such criminalization will also impact the tolerability of certain forms of expression in online consultations.<sup>47</sup>

Adding to the complexity of these issues is the realization that, even if questionable as limitations on free expression, some kinds of “civility rules” designed to maintain “communication decorum” are likely to be beneficial in producing constructive consultation. Unfortunately, the imposition of any kind of civility rules introduces at least some risk of “silent governmental censorship” or sheer arbitrariness. First, even if governments recognize that limitations

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<sup>43</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008, O.J. (L 328), 55-58.

<sup>44</sup> For example, under British freedom of speech legislation, denial of the Holocaust is allowed unless it specifically incites racial hatred. *See, e.g.,* RENATA GOLDIROVA, *EU agrees breakthrough hate-crime law*, EUOBSERVER.COM, Apr. 20, 2007, <http://euobserver.com/9/23902/?rk=1> (last visited Apr. 21, 2011).

<sup>45</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008, O.J. (L 328), 56, art. 1, para. 1(a).

<sup>46</sup> *Id.*, art. 1, para. 1(c) and art. 3, para. 2.

<sup>47</sup> Past doctrinal developments have established that the European legal system is, especially when compared to the US legal context, inclined towards general prescriptions and abstract regulations rather than resolution of these issues on a case-by-case basis.

based on the viewpoints of participants would be unlawful, any direct screening and editing of the comments is likely to create at least a perception of censorship among citizens. Furthermore, it is not at all apparent how consultation sponsors could possibly be efficient in detecting posts that one might regard as, for example, personally abusive. Imposing general restrictions on grounds of “civility” might thus be too tricky to exercise and generally inadvisable. Instead, in order to avoid allegations of arbitrary moderation, the sponsors might want to opt for providing guidelines or other forms of “soft law” that would simply encourage participants to stay within an agreeable framework of communication. In addition, they might also want to introduce some sort of “consultation ombudsman”—that is, an independent yet influential and respected person whose primary mandate would be to create a less hostile environment in which all participants would be enticed to exercise some sort of “civility norms.”<sup>48</sup>

Less difficulty would attend the imposition of certain content-neutral limitations that have generally been established as common and legitimate features of online dialogue. For example, it is obvious that consultations must be, in order to produce efficient results, time-restricted. While participants must be afforded sufficient opportunities to express themselves, the sponsor must also facilitate rationality and efficiency of the consultation process. Consequently, sponsors of online consultations “should strike a reasonable balance between the need for adequate input and the need for swift decision-making.”<sup>49</sup> In practice, for example, the European Commission considers eight weeks to be “a reasonable time-frame for consultation,” provided it offers participants “sufficient time for preparation and planning.”<sup>50</sup>

The practice of limiting an individual’s postings to a certain number per day (or to a certain length) is also common. By providing options to add links to those who wish to give further comments, sponsors may successfully limit their exposure to allegations of curbing the freedom of expression by imposing length restrictions.

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<sup>48</sup> Though rarely exercised by public authorities (as sponsors of online consultations), this practice, predominately developed in the area of civil society forums where an independent (often elected) body is given the mandate to monitor online communication, has proven to be a rather effective way of establishing good consultation practices, and is perceived by the participants as both effective and just.

<sup>49</sup> See General Principles and Minimum Standards for Consultation, *supra* note 19, at 21.

<sup>50</sup> *Id.*

Nevertheless, providing linking features could also entail new liabilities for the sponsor, in this case for the linked third-party content. More on this kind of liability will be discussed below.<sup>51</sup>

Viewpoint-neutral topic limitations are also common. Sponsors often prohibit postings that clearly have nothing to do with the subject of the ongoing consultation. If sponsors declare such a policy in their Terms and Conditions, they would be well within their rights to remove all clearly irrelevant comments. Nevertheless, because relevance may often be uncertain, sponsors may prefer to facilitate self-regulation by commenters themselves, rather than adopting an active moderating role. Sponsors might allow such postings and try to facilitate constructive consultation through self-moderating mechanisms, such as, *inter alia*, Digg-like services that support displaying the order of comments according to the users' ratings.

No matter how sensible a civility norm or other forum restriction might appear on its face, sponsors need always bear in mind that imposing limitations on dialogue always risks some exposure to a risk that government will be accused of infringing the freedom of expression. As a result, decisions based on aggressively moderated consultations can themselves become legally, as well as politically, vulnerable. Where participation rights are granted by law, judicial review might well be available for individuals aggrieved by the removal of their comments or by citizens seeking to challenge a consultation outcome as tainted by a violation of the right to be consulted.

In the EU, it was precisely the fear of these situations that led the Commission to adopt the General Principles and Minimum Standards for Consultation as a policy rather than as a legally binding document. In its communication, it explained that "the Commission remains convinced that a legally-binding approach to consultation is to be avoided" for "a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties." The Commission argued that "such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures."<sup>52</sup> Member states, however, remain free to make their consultation rights binding.

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<sup>51</sup> See Part IV, *infra*, on Cascade Liability.

<sup>52</sup> See General Principles and Minimum Standards for Consultation, *supra* note 19, at 10.

### C. RESPECTING THE RIGHTS OF PERSONS WITH DISABILITIES

Any limitations that would exclude persons with disabilities from participating in online consultation would also be problematic. For example, according to the recently adopted UN Convention on the Rights of Persons with Disabilities,<sup>53</sup> State parties must take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas on an equal basis with others, and through all forms of communication of their choice.

This Convention is pertinent for two reasons. First, it explicitly addresses the participation of persons with disabilities. Their “full and effective participation and inclusion in society” is one of the general principles of this Convention.<sup>54</sup> Accordingly, persons with disabilities have the right to benefit from measures designed to ensure their “participation in all aspects of life.”<sup>55</sup> Public authorities and institutions must provide public information “in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.”<sup>56</sup>

The second reason for the special importance of this Convention is that all EU member states have signed the Convention, as did the European Community itself, which effectively makes the Convention an integral part of the European legal order. Accordingly, the EU sponsors of online consultation need to make sure that their websites are indeed designed in a way that facilitates the effective and full participation of persons with disabilities without discrimination and on an equal basis with others.

As a guideline, sponsors of online consultation should further take into account the EU Council Resolution on e-accessibility that calls on member states “to tap the information society’s potential for people with disabilities and, in particular, tackle the removal of technical, legal, and other barriers to their effective participation.”<sup>57</sup>

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<sup>53</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

<sup>54</sup> *Id.*, art. 3(c).

<sup>55</sup> *Id.*, art. 26.

<sup>56</sup> *Id.*, art. 21(a).

<sup>57</sup> *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions –*



#### D. THE RIGHT TO USE ONE'S OWN LANGUAGE

In the multinational context of the EU, the question of language is also of concern. Considering that there are twenty-three official European languages and a vast number of documents that need to be translated on a daily basis, the multilingual challenge is substantial. As a rule, all legislative acts must be translated in all European languages.<sup>58</sup> In addition, White and Green Papers adopted by the Commission must be made available in all of the EU official languages, while other documents produced by the EU institutions are to be translated in as many official languages as possible, taking into account available resources.<sup>59</sup>

Regarding online consultations, the question arises whether sponsors should be liable for infringing citizens' rights in cases where their consultation websites support only a limited number of languages. A general legal framework is set by the European Charter, which prohibits any discrimination based on language. Under the chapter on citizens' rights, the Charter states, "every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."<sup>60</sup> Constitutional traditions of the EU member states also suggest that people should be given the right to participate in their own language. For example, the Slovenian Constitution states, "everyone has the right to use his language . . . in the exercise of his rights and in procedures before state and other bodies performing a public function."<sup>61</sup> Similar provisions can also be found in other EU member states' constitutions.

Though one might conclude that the same principles apply to online consultation, in fact this is not the EU standard. For example,

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*eAccessibility*, at 5, COM (2005) 425 final (Sep. 13, 2005) (citing Council Resolution on "eAccessibility for People with Disabilities," 2-3 Dec. 2002, 14892/02 (Presse 376) at 28).

<sup>58</sup> Regulation (EEC) No. 1 determining the languages to be used by the European Economic Community, Oct. 6, 1958, 1958 O.J. (L 17) 385, last amended by Council Regulation (EC) No. 1791/200, Nov. 20, 2006, 2006 O.J. (L 363) 1. On selective translation *see, e.g.*, Translating for a multilingual community, *available at* [http://ec.europa.eu/dgs/translation/translating/index\\_en.htm](http://ec.europa.eu/dgs/translation/translating/index_en.htm).

<sup>59</sup> *Id.*

<sup>60</sup> Charter of Fundamental Rights of the European Union, art. 41, para. 4, Dec. 14, 2007, 2007 O.J. (C 303) 10.

<sup>61</sup> Slovenian Constitution, *supra* note 5, art. 62.

since the Your Voice in Europe (YVIE) portal<sup>62</sup> was set up before the enlargements of 2004 and 2007, it currently exists in only eleven of the twenty-three official languages. In addition, there is no legal ground that would explicitly require the Commission to produce consultation documents in all of the EU official languages. In practice, documents of a legally non-binding nature are commonly published only in English, French, and German. According to one of the Commission's officers: "[a]s there are plans for a complete overhaul of the whole website, and in order to make a responsible use of the Commission's resources, the existing site has not yet been translated into the new languages."<sup>63</sup>

Given the considerable obstacles for translating all consultation documentation into all official languages, the possibility of resolving these issues is currently minimal. Nevertheless, citizens might be more successful in exercising at least their right to submit contributions in any EU official language of their own choosing. In the light of existing legislation this would not seem problematic. Yet in this case, there is an issue of how to assure that such a palette of various languages does not affect the quality and transparency of the whole consultation process. Specifically, the issue of how sponsors can assure that consultation participants understand and are able to respond to each other's comments in an ongoing manner currently remains unresolved.

## E. IDENTITY MANAGEMENT

When conducting online consultations, sponsors have various options for managing participants' identities. For example, sponsors might want to facilitate either a completely anonymous or an entirely transparent forum, or they might prefer an intermediate format in which participants may use pseudonyms, as long as their online identity remains stable. These options raise questions of whether requiring full identity disclosure would be lawful and, alternatively, what should be the consequences for the sponsor should unlawful content be posted in a forum that permits anonymity?

To answer these questions, we must first address the issue of identity management in government consultations generally.

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<sup>62</sup> *Your Voice in Europe*, EUROPEAN COMM'N (Nov. 12, 2010), [http://ec.europa.eu/yourvoice/index\\_en.htm](http://ec.europa.eu/yourvoice/index_en.htm) (last visited Apr. 21, 2011).

<sup>63</sup> E-mail from Pirkko Kauppinen, Unit Transparency, Relations with Stakeholders and External Orgs., Secretariat Gen., to author (Oct. 17, 2008) (on file with the author).

Government sponsors in the EU may legally permit anonymous participation, but, in contrast to the U.S., requiring the provision of personal data as a condition of participation does not appear to be unconstitutional in the European context. For example, the EU YVIE requires participants to provide detailed profiles. In order to be able to participate, users must provide not only a name, but also contact details (such as an e-mail address) and country of residence. In addition, information on whose behalf the comments are made and the nature of the organization for which participants work are standard registration requirements.

Because of the general axiom that consultations tend to be more constructive when participants disclose their identities, sponsors might want to establish some sort of identification system. The latter could be as minimal as providing a stable online pseudonym. For example, only one account could be associated with one e-mail or IP address. Further identification mechanisms such as CAPTCHA<sup>64</sup> (a test used in computing to ensure that the responses are not computer-generated) or any other mechanism supporting pre-established online pseudonyms, avatars, or other forms of chosen online identity with some verifiable attributes could also be put in place.

Whether postings are anonymous or not, data protection legislation requires the sponsors to protect all personal information they might obtain during consultation.<sup>65</sup> In order to comply with relevant privacy legislation, sponsors should provide a specific Privacy Statement for each consultation, containing information on what data will be collected, for what purpose, and to whom it will be disclosed. In addition, sponsors need to also provide information on how participants can access and verify their own information, and inform them of their right to object to the processing of their personal data on legitimate grounds.

In general, sponsors would be allowed to collect personal information only for “specified, explicit and legitimate purposes.”<sup>66</sup> In this context, it would clearly be illegal for a sponsor to use information for any purpose other than those specified in the Privacy Statement.

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<sup>64</sup> “Completely Automated Public Turing test to tell Computers and Humans Apart,” which usually requires users to type the letters or digits of a distorted image that appears on the screen.

<sup>65</sup> See, e.g., Council Directive 95/46, 1995 O.J. (L 281) 31 (EC); Council Directive 2002/58, 2002 O.J. (L 201) 37 (EC); Council Directive 2006/24, 2006 O.J. (L 105) 54 (EC); Council Regulation 45/2001, 2001 O.J. (L 8) 1 (EC); Council Directive 97/66, 1998 O.J. (L 24) 1.

<sup>66</sup> Council Regulation 45/2001, art. 4(b), 2001 O.J. (L 8) 5 (EC).

In order for the data processing to be legitimate, it should also meet certain additional criteria. For example, unless the processing would be considered “necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed,”<sup>67</sup> sponsors would only be allowed to process a participant’s personal data upon obtaining the unambiguous consent of the participant. In order to assure such an “unambiguous consent,” sponsors might want to ask participants to express their explicit acknowledgment and acceptance of the data processing.

In online consultations, a special question pertains to the participants’ IP addresses. Since an IP address, in isolation, would not appear to be personal data under Council Directive 95/46/EC, a sponsor would presumably be free to store IP addresses even without notifying users. Nevertheless, an IP address could become personal data if combined with other information.<sup>68</sup> For example, a website operator might be tempted to combine IP addresses with user profiles. In this case, the IP address would become personal data even if the participant’s name were to remain unknown.<sup>69</sup> This would effectively make it illegal for the sponsor to process it—unless, of course, the sponsor would specify such intent in the privacy statement and obtain unambiguous consent on the part of the participant.

Recent data retention policies could also have an impact on identity management systems. In the EU, member states are required to assure that personal data is “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.”<sup>70</sup> Accordingly, sponsors have to specify “the time-limits for storing the data”<sup>71</sup> in their privacy statement.

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<sup>67</sup> Council Regulation 45/2001, art. 8 (c), 2001 O.J. (L 8) 6 (EC).

<sup>68</sup> Here, personal data would be considered “any information relating to an identified or identifiable natural person,” where an “identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.” Council Directive 95/46, art. 2(a).

<sup>69</sup> See *IP Addresses and the Data Protection Act*, Out-Law.com, Mar., 2008, <http://www.out-law.com/page-8060> (last visited Apr. 21, 2011).

<sup>70</sup> Council Directive 95/46, art. 6(e), 1995 O.J. (L 281) 40 (EC).

<sup>71</sup> Council Regulation 45/2001, art. 11, para. 1(f), 2001 O.J. (L 8) 9.

In all of the above cases, sponsors should always make sure that they are not breaching the law by processing particular categories of personal data. For example, data protection legislation explicitly considers the storage of certain information, such as political opinions and religious beliefs, to be illegal.<sup>72</sup> These provisions could bear even more significance in the case of online consultation. It is not difficult to imagine a public consultation where participants would reveal their political opinions in a manner that could later be abused by unauthorized third-party observers. In any case where participants could be so identified, these activities might be considered a violation of their right to private life and correspondence.<sup>73</sup> While liability for such actions could presumably not be put on the sponsors, it might still discourage people from participating.

Such predicaments could obviously be avoided by facilitating anonymous consultations. Nevertheless, even in these situations, sponsors might be faced with a number of quandaries. For example, would they have to reveal the identity of participants who post various categories of inappropriate comments? Might any such obligation at least arise when a comment might be the focus of a criminal prosecution?

In principle, sponsors are required to assure that the privacy of participants is protected at all times. According to the Directive 95/46/EC, they would be liable for any “unlawful processing operation” that would infringe privacy, and would have to compensate “any person who has suffered damage as a result.”<sup>74</sup> Indeed, unless a request to reveal a particular identity came from a law enforcement agency with appropriate authority or through a court order, sponsors would not be obliged to provide such information.

Yet sponsors might not be the only ones unlawfully disclosing personal data. It is not difficult to imagine a situation where personal data would be revealed by participants themselves. Let us imagine that one participant would refer to another by his or her name and include private information such as his or her home address or health status. In the EU, such a posting might be in violation of the personal

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<sup>72</sup> “Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.” Council Directive 95/46, art.8, para. 1, 1995 O.J. (L 281) 40 (EC).

<sup>73</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, art. 8.

<sup>74</sup> Council Directive 95/46, art. 23 1995 O.J. (L 281) 45 (EC).

data and privacy legislation. When deciding the case of a Swedish catechist who had published on her website the personal data of a number of people working with her on a voluntary basis, the ECJ ruled that “the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies,” constitutes “the processing of personal data wholly or partly by automatic means,” and is therefore in breach of legislation on the protection of personal data.<sup>75</sup> Given this explanation, one can safely assume the same conclusion could be extended to the case of posting personal information in an online consultation. Any such infringement of personal data and privacy laws in online consultations runs at least some risk of criminal prosecution.

In such a case, one can assume that the sponsor might be compelled to provide the identity of the perpetrator. Yet a situation might arise where the sponsor would in fact not be in possession of sufficient information to identify an individual in question. For example, while the sponsor might have stored users’ IP addresses, such records, in isolation, would not be sufficient if the participant had used a dynamic IP address for accessing a consultation website. In this case, the ISP could also play a part. In general, the IP address could be traced to a particular ISP and, according to the Directive 2000/31/EC,<sup>76</sup> this ISP would have an “obligation to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.”<sup>77</sup>

### III. INFORMATION RIGHTS

In the last decade, both the EU and its member states have adopted a strong legal framework governing information rights.<sup>78</sup>

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<sup>75</sup> Case C-101/01, *Bodil Lindqvist*, 2003 E.C.R. I-12971, available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79968893C19010101&doc=T&ouvert=T&seance=ARRET>.

<sup>76</sup> Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC). [hereinafter e-Commerce Directive].

<sup>77</sup> *Id.*, art. 15, para. 2.

<sup>78</sup> As provided by Council Regulation 1049/2001, the EU has made all legislative efforts to “give the fullest possible effect to the right of public access to documents,” where, in principle, all documents of the institutions are accessible to the public, efficiently

General grounds for citizens' right to information can be found in the EU primary tier of legislation. According to the Treaty of Amsterdam, "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents."<sup>79</sup> These principles have further been developed by the Regulation (EC) No. 1049/2001 on Public Access to European Parliament, Council and Commission Documents,<sup>80</sup> which nowadays represents one of the central European legal sources for the freedom of information.

Based on these documents and their own constitutional traditions, European member states have established further provisions on information freedoms. In Slovenia, "the right to obtain information of a public nature" has been established at the supreme level: the Slovenian Constitution grants everyone "the right to obtain information of a public nature."<sup>81</sup> On these premises, the Access to Public Information Act specified mechanisms for obtaining public information, the rules of procedure for information requests, appellate proceedings, and the role of the Commissioner for Access to Public Information. With the aim "to enable natural and legal entities to exercise their right to acquire information held by public authorities," citizens were given access to public information which authorities must facilitate free of charge.<sup>82</sup>

Such legal frameworks governing information rights directly affect online consultations. Obviously, in order for a consultation to be meaningful and effective, sponsors must provide access to all relevant information of a public nature. Ideally, this information should also be timely, multifaceted, and reliable. Interestingly enough, some member states have already included such provisions in their legal system on information access. In Hungary, public authorities are legally obliged to make "precise, timely and ongoing" electronic disclosure of

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exploiting the vast informative potentials of the ICT. Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC).

<sup>79</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, art. 255, para. 1. *See also* the Charter of Fundamental Rights of the European Union, *supra* note 13.

<sup>80</sup> Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC).

<sup>81</sup> Slovenian Constitution, *supra* note 5, art. 39.

<sup>82</sup> Access to Public Information Act, Ur. l. RS št. 51/06, art. 2.

information. For this purpose, they must structure their homepages in a way suitable for the “disclosure of data” and “updating of the data,” which is to be provided through “continuous operation of the homepage” and without “any disruption in its operation.”<sup>83</sup>

In addition, sponsors should also ascertain *what* information needs to be provided, *how* it should be provided, and *who* should primarily be responsible for providing it. Regarding the first question, it is evident that the selection of provided information and documents may significantly affect the results of online consultation. While the public has, as a rule, the “right to *all* information of a public nature,”<sup>84</sup> obviously not all available government information will be pertinent to each and every consultation. To offer some guidelines, the European Commission’s Minimum Standards for Consultation suggest that sponsors should include “all information necessary to facilitate responses”—that is, a “summary of the context, scope and objectives of consultation” and a “description of the specific issues open for discussion or questions with particular importance . . .”<sup>85</sup> Relevant documents should either be enclosed or referred to. A special reference is also made to the need to provide “supporting documents” and “details of any hearings, meetings or conferences,” where relevant.<sup>86</sup> Accordingly, in a typical consultation case, the Commission would provide access to a text of draft legislation and supporting policy and legal references, either by publishing them directly on its website or by linking to relevant documents on external websites.

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<sup>83</sup> Act on the Freedom of Information by Electronic Means, *supra* note 22, art. 3, para. 6 and para. 7. Similarly, Slovenian Decree on the provision of public information, Ur. l. RS št. 76/05, stipulated that public authorities must put in place effective mechanisms to ensure that “their websites are at all times accessible, available, rational and user-friendly.” Slovenian Decree on the Provision of Public Information, Ur. l. RS št. 76/05, art. 12, para. 1.

<sup>84</sup> In general, exceptions are limited and usually relate to classified data, business secrets, personal data, and information the disclosure of which would constitute an infringement of confidentiality. *See, e.g.*, Slovenian Access to Public Information Act, *supra* note 82, art. 6 (emphasis added)

<sup>85</sup> Towards a Reinforced Culture of Consultation and Dialogue- General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, at 19, COM (2002) 704 final (Nov. 11, 2002).

<sup>86</sup> *Id.*



While the new legislation imposed the need “to make all public information *available through electronic means*,”<sup>87</sup> it is not possible that citizens would in fact obtain online access to all relevant data. Nevertheless, in recent years, legislators have developed a sort of “information catalogue” that established the need for online publication of particular categories of information. For example, Regulation (EC) No. 1049/2001 on Public Access to European Parliament, Council and Commission Documents established the requirement to provide online access to all legal and policy documents.<sup>88</sup> In addition, according to the Annex to the Detailed Rules for the application of Regulation (EC) No. 1049/2001, the agendas of Commission meetings, ordinary minutes of Commission meetings, and documents adopted by the Commission for publication in the Official Journal of the European Communities must also be published online.<sup>89</sup> Provided they do not reflect opinions or individual positions, even preparatory documents need to be made available online.<sup>90</sup>

The member states have generally adopted a similar online access principle, yet they have followed it in various ways. For example, Article 10 of the Slovenian Access to Public Information Act stipulates certain categories of public information that authorities are “obliged to transmit to the World Wide Web.”<sup>91</sup> First, consolidated texts of regulations and proposals for regulations, programs, strategies, instructions of a general nature, and other similar documents must be published online. Second, information on public authorities’ activities and their services must also be provided. And third, to provide truly efficient information access, the Act explicitly requires public

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<sup>87</sup> Slovenian Access to Public Information Act, *supra* note 82, art. 5 (emphasis added). See also, e.g., Hungarian Act No. XC/2005 on the Freedom of Information by Electronic Means, *supra* note 22, or Finnish Act on Electronic Services and Communication in the Public Sector (13/2003), <http://www.finlex.fi/pdf/saadkaan/E0030013.pdf>.

<sup>88</sup> European institutions should provide online access (direct or through register) to legislative and related documents (that is, “documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States”) and, where possible, to other documents “relating to the development of policy or strategy.” Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC).

<sup>89</sup> *Id.*, art. 9, para. 2.

<sup>90</sup> *Id.*, art. 9, para. 3.

<sup>91</sup> Slovenian Access to Public Information Act, *supra* note 82, art. 10.

authorities to assure online access to all information “requested by the applicants at least three times.”<sup>92</sup>

Some member states have chosen an even more decisive approach towards these issues, setting a still wider range of documents requiring online access. In Hungary, the Act on the Freedom of Information by Electronic Means requires public authorities not only to provide online access to all proposed and effective legislation, but also to the documents *related* to the legislation such as, *inter alia*, proposed amendments and recommendations produced by committees.<sup>93</sup> In some cases, public authorities are further obliged to provide these documents in a “downloadable format” with “guaranteed protection against unauthorized modification.”<sup>94</sup>

Finally, when considering information rights in online consultation, the question of who should primarily be responsible for providing online access also needs to be addressed. According to the described body of the EU and national laws, responsibility for providing online information generally lies with those public authorities who originated the information. The question arises whether these provisions could also be extended to sponsors of online consultations, particularly when they are public authorities themselves. Government sponsors should obviously be required to provide direct access to their own documents of a public nature. Nevertheless, it is not likely that sponsors would be the exclusive originators of all publicly held information relevant to their respective consultations. In case such information would originate from other public authorities, sponsors would not be legally obliged to facilitate online access. Though they could make this information available by providing links to external websites, there is currently no general obligation for them to do so.

One might assume that providing online access to both internal and external documents would subject sponsors to liability for the accuracy of the information they provide. Yet in the EU, for example, the Commission explicitly rejects such responsibility. On the EU’s YVIE portal, a disclaimer is set stating: “[t]he Commission accepts no responsibility or liability whatsoever with regard to the information on this site.” It further provides that the information “is not necessarily

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<sup>92</sup> *Id.*

<sup>93</sup> Act on the Freedom of Information by Electronic Means, *supra* note 22, art. 11, para. 1.

<sup>94</sup> This refers to the Magyar Közlöny, the Official Journal of the Republic of Hungary. See the Act on the Freedom of Information by Electronic Means, *supra* note 22, art. 12.

comprehensive, complete, accurate or up to date,” and “[i]t cannot be guaranteed that a document available online exactly reproduces an officially adopted text.” At least in cases where the Commission is also the originator of these documents, such limitations of liability would presumably be inconsequential, with or without the disclaimer.

Nevertheless, a situation can be envisioned where the sponsor would omit publishing information, intentionally or not, that could be essential for making an informed decision. If such an omission were detected only after the conclusion of a particular consultation, the question arises whether participants could demand judicial invalidation of a final decision based on that consultation. Although a substantial body of the EU consultation cases has already been developed, this particular issue remains largely untested.

#### IV. CASCADE LIABILITY OF THE ISPs AND SPONSORS

Adding to the complexity of these issues is the question of who is to be held liable in case a harmful or otherwise objectionable communication gets disseminated. Obviously, the principal liability, if any, would fall on the author of the communication at issue, but a host of subsidiary questions would be posed. Would the author be solely responsible? Could a legal claim properly be filed against the sponsor of an online consultation based on posted communications that were authored by third parties? If so, on what grounds? Might a sponsor’s liability depend on whether the author of such a posting was either known or traceable? Would liability be shared by or transferable to the ISP?

In the past, if an offender could not be found, victims used to look to the ISPs for damages. In the EU, however, that practice was discontinued in 2000 with the adoption of the E-Commerce Directive, which introduced a system of “no general obligation to monitor.”<sup>95</sup> Accordingly, the EU member states were prohibited from imposing “a general obligation on providers . . . to monitor the information which they transmit or store.” Furthermore, they could not impose an obligation on the ISPs to “actively seek facts or circumstances indicating illegal activity.”<sup>96</sup> In effect, the ISPs were exempt from liabilities related to monitoring on both the penal and civil level.

With the ISPs excluded from liability, the question arises whether responsibility “to monitor” could be transferred to a managing public

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<sup>95</sup> E-Commerce Directive, *supra* note 76, art. 15, 2000 O.J. (L 178) 13 (EC).

<sup>96</sup> *Id.*, art. 15.

authority—that is, a sponsor of online consultation. More precisely, could a sponsor be held liable for allowing the publication of allegedly unlawful third-party content on its website?

To begin with, in contrast to the U.S., Europe has no general legal imperative granting government agencies a “sovereign immunity to suit.” Though member states might regulate liability issues differently, both public authorities and public officials would not be exempt from liability on general grounds. When addressing their responsibilities in online consultations, we must therefore first investigate laws pertinent to sponsors’ liabilities, and then also investigate legal factors that mitigate against such concerns.

Generally, sponsors’ liability for third-party content seems to be particularly germane to systems acknowledging “cascade liability.”<sup>97</sup> Under this concept, the responsibility is essentially transferred from the author to another person—that is, an editor or publisher, who may be held liable if the author cannot be identified. For example, the Slovenian Penal Code states, “an editor may be liable for criminal offences committed through . . . video, audio or similar media,” provided that the author remains to be unknown until court proceedings have ended.<sup>98</sup> When considering the applicability of this concept to online consultations, two factors need to be settled: first, whether the Internet could be considered as “similar media,” and second, whether a sponsor could be considered an editor.

Courts and legislatures have dealt with both of these issues differently. Regarding the Internet as “similar media,” Italy and France have explicitly extended regulation on media to electronic communications, which essentially put the Internet into the same framework as traditional print media.<sup>99</sup> Consequently, in 2008, the Court of Modica, Sicily (perhaps absurdly) found “an unregistered blog” to be illegal, guilty of the crime of “*stampa clandestine*.”<sup>100</sup>

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<sup>97</sup> Examples of this include the French, Dutch and Slovenian criminal systems.

<sup>98</sup> Penal Code, Ur. l. RS št. 95/04 and 55/08, art. 30 and 31. Interestingly enough, the new Penal Code (in force since Nov. 2008) seems to be moving away from a cascade system, presumably to avoid the unreasonable censoring pressure that the law might be imposing on editors. Instead, the Code introduces a concept of “concurrent liabilities,” focusing on the level of fault on the part of the publisher. According to the new Penal Code, the editor could be held liable along with the author, “unless [the felony] is committed on live broadcasting and the editor could not prevent it.” Penal Code, Ur. l. RS št. 95/04, art. 166.

<sup>99</sup> See, e.g., *Nuove norme sull'editoria e sui prodotti editoriali e modifiche alla legge 5 agosto 1981*, n. 416.

<sup>100</sup> *Dritto, Politica, Cultura Della Rete*, ICTLEX.COM, <http://www.ictlex.net/?p=948> (last visited Mar. 12, 2011).

Whether the same principle could be applied to the case of an editor's responsibilities under the Slovenian Penal Code, especially given the stringent rules of legal certainty in criminal law, still needs to be determined.

The issue of whether a sponsor could be seen as an editor is yet more complicated. One could assume that, by way of analogy, sponsors would not be liable for mere "information hosting," provided they would have "no actual knowledge of illegal activity or information" and would also "not be aware of facts or circumstances from which the illegal activity or information is apparent."<sup>101</sup> Indeed, in such a case it would seem difficult to argue that the web host is acting as anything but a mere intermediary. On the other hand, though not performing "editorial functions" in a strict sense, the sponsor might still be found instrumental in making objectionable material known to the public. It could be argued that by allowing user-generated content to be posted on its website, the sponsor has in fact taken a positive act in providing the world with access to potentially objectionable content.

Contrary to the U.S. "good Samaritan defense," in the EU, a sponsor would not be automatically exempt from responsibility for publishing third-party content simply because the website it manages is unmoderated. To establish legal grounds for such an exemption, one would need to determine whether the sponsor was performing editing or merely hosting activities. Unfortunately, the E-Commerce Directive does not provide sufficient clarity on these issues, nor does it provide unequivocal guidance on the scope of forum operators' responsibilities for user-generated content.<sup>102</sup>

To mitigate these ambiguities, courts have battled issues of liability for user-generated content in different ways. In 2004, the Supreme Court in Germany ruled forum operators have an obligation to prevent users from posting content of an illegal nature on their websites. Based on this ruling, in the *Heise Zeitschriften Verlag* case, the First-Instance Court of Hamburg ruled that one forum operator was in fact liable for the content on its website, despite the fact that the operator removed disputed content immediately upon receiving

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<sup>101</sup> E-Commerce Directive, *supra* note 76, art. 12, 13, 14.

<sup>102</sup> This has already created problems for the EU member states faced with the obligation to implement this Directive, and especially when considering applications related to Web 2.0, this distinction is rather blurred. To make the legislation more precise, France has already considered a change in the law implementing the E-Commerce Directive that would specifically address rules for Web 2.0.

notification. By suggesting that the forum operator should “either increase its funding or limit . . . its operations” in order to complete the task of active monitoring, the court essentially mandated all operators to review all user-generated content even before it appears online.<sup>103</sup> Clearly this ruling put heavy pressure on forum operators. It was not until two years later that these cumbersome requirements were changed. In 2007, the Intermediate Court of Appeals in Dusseldorf contradicted the Hamburg decision by ruling that forum operators are required to delete users’ postings only if they have actual knowledge of their illegal nature.<sup>104</sup> The court ruled that it would be unreasonable to expect operators to monitor all comments actively even before posting them. Nevertheless, according to this ruling, operators must be able to demonstrate their ability to review expeditiously and delete comments upon obtaining actual notice of their illegal nature.

While the E-Commerce Directive explicitly refers to “expeditious removal,”<sup>105</sup> it does not provide any further explanation of this legal standard. In order to minimize harmful effects, the period of “expeditious removal” should obviously be as short as possible. By way of analogy, one can assume the content should be removed within a few working days. For example, under the UK Terrorism Act, this period must be no longer than “two working days after the day on which the notice was given.”<sup>106</sup> Similarly, in Slovenia, a recent court injunction allowed three days for the removal of defamatory content from the website of a political party.<sup>107</sup>

Further uncertainties might be caused by the fact that the E-Commerce Directive has not set up a procedure for removing unlawful content. This “omission” is especially noticeable when compared to the elaborate “notice and take down” procedures specified in the U.S. Digital Millennium Copyright Act (DMCA).<sup>108</sup> While the E-Commerce

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<sup>103</sup> Landgericht Hamburg, Nr. 324 O 721/05, *available at* [http://www.heise.de/recht/2006/lg-hh\\_02-12-2006\\_324-O-721\\_05\\_heise.pdf](http://www.heise.de/recht/2006/lg-hh_02-12-2006_324-O-721_05_heise.pdf).

<sup>104</sup> Court of Appeals in Dusseldorf, Az I-15 U 21/06.

<sup>105</sup> E-Commerce Directive, *supra* note 76, art.13, 14.

<sup>106</sup> Terrorism Act, 2006, c. 11,(U.K), *available at* [http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en_1).

<sup>107</sup> Local Court of Ljubljana Interim Injunction of Oct. 28, 2008, in case of F. Perčič proti SDS.

<sup>108</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.).

Directive introduces the requirement to disable access to any content that might be illegal immediately after actual knowledge or sufficient awareness of such content is obtained, it might not always be easy to establish the precise moment at which the website operator has indeed obtained such knowledge. One obvious way for operators to minimize their risk is by providing links to complaint mechanisms, inviting users to report abuse or complain about the content. Such mechanisms can effectively facilitate prompt notification of allegedly unlawful third-party content and provide operators with sufficient time to take down all offending content as quickly as it appears on the website.

Nevertheless, even if such “complaint mechanisms” are effectively put in place, sponsors are still left with the uncertainty of how to deal with potentially frivolous notifications. The E-Commerce Directive leaves operators with considerable latitude. In case of a court order or administrative authority request, the access to illegal content should understandably be terminated immediately.<sup>109</sup> In all other cases, however, sponsors are given substantial autonomy in determining whether notifications are justified or spurious. This puts sponsors in a rather dubious position: they can either remove the content and risk being accused of infringing freedom of expression or they can maintain a post and risk being held responsible for the publication of unlawful content.

To answer some of these issues, in October 2008, the Dutch government, in cooperation with leading ISPs, proposed a special Notice-And-Take-Down Code of Conduct.<sup>110</sup> Though not legally binding, this Code represents a positive attempt to provide intermediaries with much needed guidelines on how to “deal with reports of unlawful content on the Internet.” To begin with, according to the Code, intermediaries must make their notice-and-take-down procedures public. They must explain their response processes, including time limits and the information they require to be submitted in order for the notice to be dealt with. If an intermediary determines, based on information provided, that the content concerned “is unequivocally unlawful,” such content must “immediately be removed.” In all other cases, intermediaries should try to reach an agreement with the notifier. If negotiations turn out to be

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<sup>109</sup> E-Commerce Directive, *supra* note 76, art. 14, para. 3.

<sup>110</sup> Dutch Notice-and-Take-Down-Code of Conduct, Version 1, Oct., 2008, *available at* [http://www.samentegencybercrime.nl/UserFiles/File/NTD\\_Gedragcode\\_Opmaak\\_Engels.pdf](http://www.samentegencybercrime.nl/UserFiles/File/NTD_Gedragcode_Opmaak_Engels.pdf).

unsuccessful, the Code further suggests that the notifier should “make an official report to the police if in his or her opinion [the content] constitutes a criminal offence,” or “start a civil procedure.”<sup>111</sup>

Perhaps at least some of these liability issues could be mitigated through the active moderation of online consultation. Two basic moderating options can be envisioned. In the first, the sponsor would prescreen all user-generated content for suitability before posting it on a website. In this case, the sponsor would obviously act as an editor and should therefore be held responsible as such. Sponsors’ liability might become especially stringent in cases where anonymous postings are permitted; if a perpetrator cannot be identified, the sponsor might be considered to have willingly taken the risk of being the sole actor accountable. In addition, by prescreening all content, sponsors would make themselves vulnerable to a variety of allegations of excessive moderation or even censorship—a circumstance that sponsors would presumably wish to avoid.

Given these difficulties, sponsors might decide to moderate consultation by reviewing postings only after they appear on their websites. In this case, their liability would presumably be less stringent. It would probably be limited to situations where disputed content would indeed be found legally objectionable, and the sponsor would fail to expeditiously remove it upon notification.

To mitigate their risks, sponsors might routinely want to specify certain “Terms and Conditions of Use” that participants could accept by checking a box before being allowed to post a comment. While respecting constitutional guarantees for the freedom of expression,<sup>112</sup> sponsors might still want to explicitly prohibit any defamatory, obscene, or otherwise offensive content inciting hatred, discrimination, violence, or slandering of personal dignity, at least to the extent that EU law allows. In addition, sponsors might also want

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<sup>111</sup> Though adoption of this Code is encouraging, the Code itself still seems to offer more questions than answers. For example, the Code does not specify an acceptable timeframe for responding to notice. Furthermore, it is not clear whether an anonymous notice could even be submitted. Indeed, the Code explicitly requires notifiers to provide their contact details in order for a notice to be processed. While seemingly in contradiction with the whole spirit of the Code, such wording suggests that intermediaries might even be exempt from any obligation to remove content if the only notice they receive of potential illegality is submitted anonymously.

<sup>112</sup> For example, the general prohibition of “undesirable” or “harmful” content would appear problematic. While such wording seems to be rather popular among ISPs (*see, e.g.*, Dutch Notice-And-Take-Down Code of Conduct, *supra* note 110), public authorities would probably be required to introduce more legal certainty in their terms and conditions of use.



to prohibit all obviously irrelevant submissions, revelations of personal data, and advertising.

Within their efforts to minimize liability, sponsors might also opt for providing a disclaimer stating something like, “We are not responsible for information posted in this consultation,” “We do not warrant accuracy or reliability of the content,” or perhaps even, “The content posted on this site is viewed and used by participants at their own risk.” Such a disclaimer might not always be effective, however, in limiting sponsor liability. Imagine the sponsor of an online consultation publishes a disclaimer of responsibility for any content in the forum, but then publishes blatantly defamatory comments. Whether or not the sponsor would bear liability for defamation would still likely depend on the moderating role of the sponsor, not on the presence of a disclaimer. For example, in the case of an unmoderated forum, one can imagine that the plaintiff would probably have difficulties establishing fault on the part of the sponsor as mere intermediary. Liability for an operator of an actively moderated forum would depend on whether he or she had actual editorial control at the time of the posting of the content in dispute.

## V. UNCHARTED TERRITORY

Given the relative novelty of online consultations, it is not surprising that liability issues are not the only “grey area” of the pertinent legal framework. Procedural questions also remain largely undetermined. For example, it is not at all clear who should bear the onus of proof when qualifying for liability limitations as provided by the E-Commerce Directive. Indeed, should a sponsor be the one proving that he or she had no actual knowledge of the comment’s unlawful nature, or should existence of such knowledge be proven by the plaintiff? Similarly, it is unclear who should carry the burden of proof when establishing whether the sponsor had editorial or merely hosting control over the published content. While answering these questions might be of vital importance for the creation of an efficient liability system, comprehensive legal solutions are unlikely to be presented any time soon.

Additionally challenging are some particular forms of online conduct. While linking, tagging,<sup>113</sup> and RSS feeds<sup>114</sup> might be

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<sup>113</sup> Providing meta-data to user-generated content that allows users to navigate the sites. See, e.g., Flickr.com, <http://www.Flickr.com> (last visited Mar. 12, 2011).

<sup>114</sup> “Really Simple Syndication” feeds allow automatic content sharing between sites in a standardized format.

considered regular activities of Internet users, legislation addressing these issues is practically nonexistent. Imagine that on a public consultation website, a participant posts a perfectly legitimate comment, but adds a link to a website with unlawful material. Could the sponsor be held liable for the linked content? In France, the Tribunal de Grande Instance de Paris (TGI) found three website operators who provided hyperlinks to another website containing gossip guilty of invading French privacy laws. By its decision, later reviewed by the Paris Court of Appeal, the TGI ruled that, by sending the reader to another website, the operators effectively contributed to the spread of illicit information, and should therefore “be responsible as editors of such information.”<sup>115</sup> In November 2008, the Court of Appeal changed this ruling, deciding that website operators cannot be held responsible as editors for merely providing links to third-party content.<sup>116</sup> According to this decision, enabling users to upload any content is considered as information hosting, and website operators are considered hosting providers. Needless to say, if the original ruling had stood, even a mere hosting of a link on one’s website might become a rather hazardous activity.

Given the legal idiosyncrasies of linking, providing RSS feeds might also prove to be problematic. While one might presume that RSS feeds, especially considering their “automatic” nature (hardly entailing any “editorial control”), could not expose the host to liability for their content, a recent verdict, once again in France, found three websites liable for content posted on their sites automatically via RSS. Content was found to be in breach of French privacy laws, and the three RSS feed publishers were found liable for providing links and snippets of text on their sites. Though they argued they had no editorial control over the third-party content, the court ruled that “the defender [sic] has, by subscribing to the syndication feeds and by combining them according to a predetermined layout, acted as a publisher and must therefore assume responsibility for the information which is displayed on his own site.”<sup>117</sup>

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<sup>115</sup> TGI Paris, ord. référé, 26.03.2008, Olivier Martinez c/ SARL Bloobox.net (aff. Fuzz.fr), *available at* <http://www.juriscom.net/jpt/visu.php?ID=1043>.

<sup>116</sup> Cour d’appel de Paris 14ème chambre, section B Arrêt du 21 novembre 2008, Bloobox Net / Olivier M., *available at* [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2488](http://www.legalis.net/jurisprudence-decision.php3?id_article=2488).

<sup>117</sup> TGI Nanterre, ord. référé, 28.02.2008, Olivier Dahan c/ Eric Duperrin (Aadsoft.com, Planete Soft), *available at* <http://www.juriscom.net/documents/tginanterre20080228.pdf>.

Though presumably less applicable to online consultation, tagging also warrants mention. Regarding the above-cited rulings, the question arises whether the same liability principles would be applied to the practice of tagging. That is, could a sponsor of online consultation be sued over the content to which only a tag was provided? If a participant would deliberately tag content with words leading to obscene material, could he or she be held liable for such content? And, could such liability, if any, be transferred to the sponsor, as well? Currently, these issues remain largely untested in the EU.

## VI. CONCLUSION

In the last decade, at both supranational and national levels, European governments have been actively promoting online consultations. These efforts have already resulted in a substantial body of law that, combined with existing legislation, affects both governments and citizens when engaging in online consultation. This article has attempted to show how the existing legal regime effectively shapes these consultations, and what actions European managing public authorities—that is, sponsors of online consultation, should consider in order to both ensure their legal compliance and to promote participation.

New technologies, like all new phenomena, challenge existing laws. Yet it would be a mistake to suggest that we should, when contemplating online forums, focus only on new technology-related legislation. As our analysis has shown, participation, communication, and information rights, when distilled, remain at the core of online consultation processes. What is less clear, however, is how these rights should be applied to the online world. Therefore, in order to sketch a map of legal foundations for online consultation, I have taken into account both existing regimes and anticipated new challenges. By analyzing relevant national and international law, I have tried to address the most frequently posed online-forum-related issues. With examples from recent court decisions, I have tried to outline the most pertinent issues and to identify those situations where judicial review will soon become critical.

The speed of technological development presents only one of the many hurdles in navigating through the legal mosaic of online consultation. Consultation policies and corresponding regulations are often adopted sporadically, making it difficult to steer through the relevant legal terrain, which is often complex and sometimes

seemingly impenetrable given the overlap in institutional authorities and jurisdictions.

How does this complexity affect the sponsors of online consultation? While addressing pertinent legal questions seems to be of vital importance for the creation of efficient online consultation systems, no comprehensive set of legal solutions is now on the horizon. Technology changes much too frequently for the legal mind, conservative by nature, to be capable of anticipating all potential developments. At the same time, I believe that operating legally unpredictable online environments is risky. It can lead to a number of predicaments involving potentially risky consequences, especially in the case of online consultations where expectations of generating democratic momentum are substantial. Past experiences have shown that e-commerce really took off only after gaining trust with users, and adopting predictable legal frameworks played no small part in this. Therefore, I suggest that vigilant legal support must become a permanent element of operating public online forums.